U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 19 2004

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The director denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a sole proprietorship that seeks to employ the beneficiary as its vice president. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition because: (1) there is no qualifying relationship between the petitioner and an overseas entity; (2) the beneficiary was not employed in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States in a nonimmigrant status; and (3) the proffered position in the United States is not in an executive or managerial capacity.

On appeal, counsel submits a brief.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), states, in pertinent part:

> (1) Priority Workers. – - Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. – - An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it is affiliated with Digvijay Steel of India and operates a Subway® sandwich shop. The petitioner indicates that it employs 12-15 persons, and it is offering to employ the beneficiary permanently at a salary of $18,755 per year. According to the I-140 petition, the beneficiary entered the United States in B-1 status on May 10, 2002.

The first issue to be discussed is whether a qualifying relationship exists between the petitioner and the foreign entity, Digvijay Steel. The petitioner claims that it and Digvijay Steel are affiliated because Mr.

[redacted] owns 60 percent of the foreign entity and 100 percent of the petitioner. When filing the petition, the petitioner submitted a franchise agreement between Doctor's Associates and [redacted] According to the agreement, [redacted] became the owner of one Subway® sandwich shop after purchasing the shop from [redacted]

In a February 23, 2003 Notice of Intent to Deny (NOID), the director stated that because the petitioner is a franchisee, there can never be actual ownership and control by a foreign entity.[1] The director noted that the franchisor actually owns the petitioner and the foreign entity just purchases the license to operate the franchise. The director provided the petitioner with a 30-day opportunity to provide any evidence in rebuttal.

In response, counsel stated that the petitioner is not owned by the franchisor. According to counsel, "The petitioner purchased the franchise business from [redacted] in 1998 for the amount of $257,000. The sale included 'all furniture, fixtures and equipment located at [redacted] and known as 'Subway #18723'." Counsel also stated that the agreement entered into between Doctor's Associates and the petitioner gives the petitioner control over the business and assumption of all risks associated with the business.

The director denied the petition, in part on this issue, for the reasons stated in the NOID. According to the director, the issue of control is more important than the issue of ownership. The director stated, "The petitioner may purchase a franchise but can never own and control it because it only holds a license from Doctor's Associates, Inc. (Subway) to operate the store." The director reiterated that the petitioner only purchased a license to operate a Subway® sandwich shop.

On appeal, counsel restates points made in response to the NOID. Counsel asserts that the franchise agreement explicitly states that the franchisor relinquishes control over the business to the franchisee, and that it is "within the power of the franchisee . . . to successfully operate the business."

Pursuant to 8 C.F.R. § 204.5(j)(2), *affiliate* means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity . . . .

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289

[1] The AAO notes that the director referred to the "foreign owner" of the petitioner as an entity; however, the record indicates that an individual, Hasamukh Modi, claims to be the owner.

(Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

The AAO does not concur with the director that the issue of control over an entity is more important than the issue of ownership. Both issues are equally critical in a determination of whether a U.S. entity is affiliated with a foreign entity under U.S. immigration law. The AAO also does not concur with the director in his interpretation of the franchise agreement in the record. No language in the agreement indicates that the petitioner merely purchased a license and does not have control over the store's operations. The franchise agreement does, however, raise questions about the petitioner's claimed ownership of the Subway® shop.

As ownership is a critical element of this visa classification, the AAO may reasonably inquire beyond the franchise agreement into the means by which the franchise was acquired. Evidence of this nature could reasonably include documentation of monies, property, or other consideration remitted in exchange for the claimed ownership interest. In the response to the NOID, counsel claimed that in 1998, [redacted] paid $257,000 to [redacted] for the purchase of the Subway® shop. Counsel quoted a document which allegedly states that the sale included "all furniture, fixtures and equipment located a[redacted] d known as [redacted]

The record does not contain any documentary evidence of the purchase agreement that was allegedly made between [redacted] regarding the Subway® shop in question. Counsel's unsupported statements about the terms of the alleged agreement are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Although the record contains copies of monthly statements from Textron Financial that relate to a "promisary note/contract payment" in the amount of $2,676, there is no supporting evidence to show that the note relates to the purchase of the Subway® shop. More importantly, if the terms of the purchase agreement are prospective in nature, conditioned on Mr. Modi's payment of the $257,000 in its entirety by monthly payments, then Citizenship and Immigration Services (CIS) must confirm that Mr. Modi successfully paid the note and acquired ownership of the Subway® shop prior to the filing of the petition on November 14, 2002. A visa petition may not be approved based on speculation of future eligibility or after the beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Ultimately, there is no evidence that Mr. Modi actually purchased the Subway® shop from Mr. Makoui because no documentary evidence supports such a transaction. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Accordingly, because the issue of ownership has not been resolved, CIS cannot conclude that the petitioner and Digvijay Steel are affiliated, in that Mr. Modi owns and controls the U.S. and foreign entities.

Notwithstanding the petitioner's failure to establish the claimed transaction, the nature of the petitioner's business may also present an obstacle to the petition's approval. The petitioner claims to be a sole proprietorship that is owned entirely b[redacted] The record does not contain any evidence [redacted] current immigration status. If, however, [redacted] is a nonimmigrant, then this petition could not be approved. First-

preference immigrant status under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), requires that the beneficiary have a permanent employment offer from the petitioner. A petitioner who is a nonimmigrant temporary worker is not competent to offer permanent employment to an alien beneficiary for the purpose of obtaining an immigrant visa for the beneficiary under section 203(b)(1)(C) of the Act. *Matter of Thornhill*, 18 I&N Dec. 34 (Comm. 1981).

The second issue to be discussed in this proceeding is whether the beneficiary's job with the foreign entity was in a managerial or executive capacity. Pursuant to 8 C.F.R § 204.5(j)(3)(i)(B), the beneficiary must have been employed by a qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States in a nonimmigrant status.[2] Because the petitioner has failed to show that a qualifying foreign entity exists, the petitioner cannot meet the regulatory requirements of 8 C.F.R § 204.5(j)(3)(i)(B). Accordingly, the director's decision on this issue shall not be disturbed.

The third and final issue to be discussed in this proceeding is whether the proffered position in the United States is in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
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> (i) manages the organization, or a department, subdivision, function, or component of the organization;
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> (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
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> (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

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[2] The I-140 petition indicates that the beneficiary entered the United States in B-1 status on May 10, 2002.

The term "executive capacity" means an assignment within an organization in which the employee primarily-

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

At the time of filing the petition, the petitioner described the beneficiary's duties as follows:

> As Vice President, he will provide leadership, implement company policy and present monthly, quarterly and annual reports and ensure that effective planning and controls are implemented. He will oversee all financial matters of the company, including banking, oversee the maintenance of accounting records, maintaining the credit worthiness of the company, [and] setting of budgets. He will be responsible for sales an[d] marketing, new product development, negotiate new products with vendors, suppliers and customers, maintain inventory controls, set sales targets, [and] ensure high standard of customer service. He will have full authority to hire and fire employees and assume overall responsibility in the absence of the President.

In the February 2003 NOID, the director stated that the managerial and/or supervisory duties of the beneficiary have not been established. The director indicated that the petitioner failed to submit an organizational chart or job descriptions for its employees. The director concluded that the beneficiary would function as a first-line supervisor to nonprofessional employees.

On appeal, counsel states that the proffered position is in an executive capacity, not a managerial capacity. Counsel claims that when filing the petition, the petitioner submitted an organizational chart that listed its employees and their job titles. Counsel states that the beneficiary will direct the management of the business, implement company policy, hire and fire employees, and "will only have the President of the company to answer to."

The evidence in the record fails to establish that the proffered position is in a managerial or executive capacity. As stated previously, the petitioner is required to furnish a job offer in the form of a statement that clearly describes the duties to be performed by the beneficiary. 8 C.F.R. § 204.5(j)(5). The description of the beneficiary's job that the petitioner submitted at the time of initial filing indicates that the beneficiary will perform duties not typically representative of an executive. For example, the petitioner states that beneficiary "will be responsible for sales an[d] marketing, new product development, [and] negotiate new products with vendors, suppliers and customers." These job responsibilities are typical of a sales and marketing position.

An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In addition, although counsel claims that the petitioner submitted an organizational chart at the time of filing the petition, the document to which counsel refers (Exhibit C-20) is not a true organizational chart. Exhibit C-20 merely lists the names and job titles of each employee; it does not provide the direct and indirect line reporting authority for each employee, nor does it contain job descriptions for the employees. Accordingly, there is no information about which employees, if any, that the beneficiary will supervise, or whether any other employees have supervisory responsibilities. No evidence in the record sheds any light on how the petitioner organizes its staff to achieve its operational goals.

The record does not contain sufficient evidence to establish that the position offered to the beneficiary is in an executive or managerial capacity. Therefore, the director's decision to deny the petition on this basis shall not be disturbed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.